SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 366

DAVE ROSENBLOOM,

Petitioner,

—vs.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dave Rosenbloom prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above-entitled case on April 27, 1966.

Citations to Opinions Below

The oral opinion of the Hustings Court of the City of Richmond, Virginia (T. 141-143)[1] is unreported and is printed in the Appendix, *infra,* p. 22. The Memorandum Opinion of the Hustings Court of the City of Richmond, Virginia is unreported and is printed in the Appendix, *infra,* p. 24.

[1] The symbol "T" refers to the transcript of the trial record in the Hustings Court.

Jurisdiction

The judgment of the Hustings Court of the City of Richmond, Virginia, was entered on June 11, 1965. Appendix, *infra*, p. 23. On April 27, 1966, the Supreme Court of Appeals of Virginia refused to grant a writ of error and supersedeas. Appendix, *infra*, p. 21. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3).

Questions Presented

1. Whether the courts of Virginia failed to follow applicable decisions of this Court which have held that nudist publications, similar to the publications which are the basis of the conviction here, are not "obscene."

2. Whether the conviction of petitioner for exhibition and distribution of items consisting solely of nudist publications violates the First and Fourteenth Amendments to the United States Constitution.

3. Whether the nudist publications which were the basis of petitioner's conviction are "obscene."

Statute Involved

SEC. 18.1-227 AND SEC. 18.1-228, CODE OF VIRGINIA OF 1950, AS AMENDED

§ 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shame-

ful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. (1960, c. 233.)

§ 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or commercial distribution; or

(2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or commercial distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item, shall be guilty of a misdemeanor. (1960, c. 233.)

Statement of the Case

Dave Rosenbloom, the petitioner herein, is the owner and operator of a retail book store, trading under the name The Booktrader in the City of Richmond, Virginia, at 211 North 7th Street, in the heart of the downtown business district. He sells a wide variety of books, from general publications to books with highly specialized or technical content (T. 54).

On October 23, 1964, a police officer, N. J. Hunt, purchased from the petitioner a nudist publication known as "Solis." Exhibit #1. The magazine is printed entirely in

the German language. The magazine was purchased because it was the understanding of Officer Hunt that, according to the Virginia statute, pictures of the human body with visible pubic hair are obscene (T. 30).

A few days after purchase, Lieutenant Russell L. Baughan, the head of the Vice Division of the Richmond Police Department, together with Officer Hunt, returned to Mr. Rosenbloom's store and seized all the nudist magazines that were on display. The magazines, 107 in all (Exhibit #2), were displayed in individually sealed plastic bags. All the magazines contained photographs of nude men, women and children at nudist camps, engaged in the usual activities of a summer camp such as swimming, volley ball, hiking, etc. The nudist magazines were the sole object of this police action (T. 34).

On October 27, 1964, Mr. Rosenbloom was arrested and charged with violation of Sec. 18.1-228 Code of Va. 1950 as amended, *supra*.

The matter first was heard in the Richmond Police Court where Mr. Rosenbloom was convicted and fined $200.00. It was appealed to Hustings Court, a trial court of record of the City of Richmond, and was tried by the court without a jury on March 22, 1965.

Officer Hunt and Lieutenant Baughan, the arresting officers, were the only witnesses offered by the Commonwealth at the Hustings Court trial. They testified on direct examination solely to the facts of the arrest. Except for the publications themselves, there was no evidence offered by the Commonwealth to prove that the publications were obscene.

Five witnesses, including the petitioner, testified on behalf of the petitioner: James C. Rogers, a social welfare worker, whose primary fields of study are psychology and sociology (T. 73); Mr. and Mrs. Walter Young, owners of a nudist resort in Virginia (T. 85, 101); James Jackson Kilpatrick, Editor of the Richmond News Leader, writer, and author of a publication dealing with obscene materials called "The Smut Peddlers" (Doubleday, 1960); and Dave Rosenbloom, the petitioner (T. 53). Their evidence went to prove that the magazines were not obscene under the law.

The social worker and owners of the nudist camp testified to the effect that, although the magazines contained unretouched photographs of nude men, women and children, they did not, in their opinion, have as their dominant theme an appeal to prurient interest. On the contrary, they were informative about nudist life and a desirable means of communication to those engaged in the nudist movement and of promoting the movement among others (T. 76, 90, 102, 103). Their testimony established that the material contained in the publications had redeeming social value.

James Jackson Kilpatrick's testimony was to the same effect: that there was nothing objectionable about the photographs except that the people were unclothed; that the ideas contained in the publication, though unpopular and distasteful to many, had redeeming social value which those in a free society have a right to advocate; and by reason of his profession and his familiarity with contemporary community standards, he believed that to the average person, the dominant theme of the publications taken as a whole did not appeal to prurient interest (T. 130, 132-134).

By written motion to quash and to dismiss the warrant, filed February 24, 1965 (R. 5),[2] the petition, among other things, moved the court in paragraph (d) (Appendix, *infra*, p. 31), to dismiss on the ground that the petitioner's right to sell the publications was a constitutionally protected right and privilege. The motion, when presented and argued at the commencement of the trial, was overruled by the Court and petitioner duly excepted.

Again, at the conclusion of the case, in its oral Opinion (T. 141-143; Appendix, *infra*, p. 22), and in its written Opinion (Appendix, *infra*, p. 24), the Court overruled the motion, to which exception was taken (R. 40; Appendix, *infra*, p. 27). The sole question, as stated by the Trial Court, was whether the publications were obscene (T. 37).

At the conclusion of the Commonwealth's evidence, the petitioner moved to strike the evidence of the Commonwealth on the ground that there was an applicable decision of this Court, namely, *Sunshine Book Co., et al.* v. *Summerfield*, 355 U. S. 372 (1958), that should be followed by the Trial Court (Appendix, *infra*, pp. 32-33). This motion was overruled by the Court, to which exception was made. The final written and oral opinion of the Court ignored this question completely (R. 8; Appendix, *infra*, pp. 22-26).

At the conclusion of all the evidence in the case, the Court directed counsel to submit written briefs (R. 40). Petitioner's brief urged the dismissal of the case against the petitioner on the ground that the rights of freedom of speech and press were protected by the First and Fourteenth Amendments to the Constitution of the United

[2] The symbol "R" refers to the Record in this case.

States and that the nudist publications were not obscene, as decided by this Court in *Sunshine Book Co., et al.* v. *Summerfield, supra* (R. 10-26). A compilation of exhibits and decisions in the series of cases that culminated in the final order in the *Sunshine Book Co.* case was submitted with the petitioner's brief and is part of the Record of this case.

The trial court, by order entered June 11, 1965, convicted petitioner and overruled motions to set aside the judgment as being contrary to the law and the evidence and to grant a new trial. Petitioner duly excepted (R. 40).

Notice of appeal and assignment of errors was filed, raising the same Federal questions with the Supreme Court of Appeals of Virginia. Order refusing writ by the Supreme Court of Appeals of Virginia is contained in the Appendix, *infra,* p. 21.

Reasons for Granting the Writ

1. In *Sunshine Book Co., et al.* v. *Summerfield,* 355 U. S. 372 (1958), this Court held that nudist magazines essentially identical to the ones involved in the case at bar were not obscene. Thus, the courts below, by convicting petitioner for selling and exhibiting such magazines notwithstanding *Sunshine Book Co.,* decided a federal question of substance in a way not in accord with applicable decisions of this Court. See too *Mounce* v. *United States,* 355 U. S. 180 (1958).

The State Courts were made aware of the *Sunshine Book Co.* case decision of this Court. During trial, when

motion was made to strike the evidence of the Commonwealth, the case was cited (T. 51; Appendix, *infra*, p. 33). At the conclusion of the trial, in the brief requested by the Court, the history of *Sunshine Book Co.* was set forth in detail from the time of its inception to the issuance of the *per curiam* order by this Court on January 13, 1958 (R. 14-15). Furthermore, the Court was furnished with copies of the nudist publications which were the subject of the *Sunshine Book Co.* case and with copies of the opinions of the courts which considered the case, from the initial stages through the final order of this Court (R. 16). The exhibits and decisions were made a part of the record.[3] Nonetheless, the *Sunshine Book Co.* case was never mentioned by the state courts, either orally or in the written opinions.

Sunshine Book Co. held that neither nudity nor photographs that show pubic hair are *per se* obscene. Other cases, which were also brought to the attention of the courts below (R. 13, 18, 19), have also held that nudist magazines are not obscene: *Mounce* v. *United States*, *supra*;[4] *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940).

2. The petitioner has shown that the applicable cases of this Court, particularly *Sunshine Book Co.*, have held that nudist publications are not obscene. Even if this were

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[3] A comparison between the magazines which were the subject of the *Sunshine Book Co.* case and those which are the subject of the instant case reveals that they are substantially identical. They all contain unretouched photographs of nude men, women and children, which show pubic hair.

[4] The nudist publications involved in *Mounce* included, among others, the Magazine "Solis," the very magazine purchased by the arresting officer in this case.

not so, the facts of this case are such that the publications are not obscene within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957).

James C. Rogers, a witness for the petitioner, a social welfare worker employed by the City of Richmond, and a free-lance writer for nudist publications, testified that nudist publications are published "to foster communication between people who are interested in the nudist movement and further to inform other people who might be interested in the benefits to be derived from nudism" (T. 76). In the interest of brevity, the impressive background of Mr. Rogers should be noted in the transcript (T. 73).

He testified further that "there are approximately 125 nudist resorts or groups . . . organized throughout the country." Throughout his testimony he stressed " . . . the benefits of nudism and the process of developing a healthy mind and a healthy body by the honest approach to life . . . " (T. 81).

Mr. and Mrs. Walter Young, owners of a nudist resort in Virginia, testified that their resort is called Buck's-Kin Lodge, is located 18 miles from Winchester, Virginia, and when first established in 1952, it "shook Frederick County to the roots" (T. 86), but now they are well accepted. They have raised six children in the nudist philosophy, four girls and two boys. Three girls are married and the Youngs have three grandchildren.

Mrs. Young testified to the effect that, on the average, 3,000 to 3,500 campers annually come to their resort, with 50 to 100 families from Richmond. Nudism is an international movement and they have visitors from many countries (T. 87).

To the question, "Would you tell us the purpose and the principles of the practice of nudism, as you understand it?", Mrs. Young's reply was:

> "Well, first, there is nothing wrong with the human body, and I—we believe that we should have on all parts of you the sun and air, that a healthy mind and a healthy body is what we wish. Children brought up in nudism are not candidates for delinquent courts. There's quite a bit, I believe— It keeps families together. Today we tend to—mother goes one place, father another, children another. This is a family recreation. We swim, play volley ball, table tennis, any of the sports. You go on nature walks, and it just—a family has their recreation together stays together" (T. 88).

Further, Mrs. Young testified that there are several organizations that foster nudism including the American Sunbathing Association and the National Nudist Council; that the attitude of the national organizations toward public education regarding the principles of nudism is very strong and that they use the magazines and word of mouth to make as many converts as possible. She further stated that the magazines disseminate information about the various facilities that are available and the functions which occur there; that inter-club news is a good portion of the publications. When questioned as to whether, in her opinion, photographs in nudist publications should be retouched, she said (T. 91-92):

> "A. I don't believe they should be retouched, because by being retouched they make us hypocritical; they also draw attention to exactly what we don't wish to draw attention to.

Q. Have you noticed anything that you consider to be obscene in these publications? A. No, sir, I have not.

Q. Do you feel that these publications have a social value? A. Yes, sir.

Q. And that is in the nature of the information that they disseminate and the interest that they create? A. Yes, sir.

Q. What about the printed material that appears in some of the magazines? A. I think it is very good, I think it tells us—answers the question that the average person would be asking about nudism itself."

The testimony of Mr. Young reinforced the testimony of his wife. He testified, in part, as follows (T. 101-102):

"Q. Have you looked and seen other nudist magazines over a period of time? A. I expect I have two thousand at home.

Q. What is their function? A. Their function is to disseminate information amongst the camps and to the general public at large, to assist in fostering the acceptance of the nudist philosophy.

Q. What is the nudist philosophy as you understand it? A. Well, very basically and briefly, it is the healthy mind and a healthy body, and one has to have mental, moral and physical well-being to be a thoroughly healthy person, it takes equal shares of each to make one a fully balanced and thoroughly healthy person.

Q. Is the philosophy completely accepted by the American public at large. A. No, unfortunately, it is not—it is a slow educational process.

Q. Is one of the functions of the associations to encourage such education? A. Yes.

Q. What role do the magazines of the kind generally known as nudist magazines play in this general education? A. They play a very important role in this education.

Q. How do they do that? A. By disseminating this information to the general public in all areas in which it is not stifled.

* * * * *

"Q. You are the owner of the lodge and you are a practicing nudist? A. Yes.

Q. Now, in that capacity, can you tell us of any other social value that the publications have in addition to the general dissemination of information to the public? A. Well, that is the principal value as I see it, they also in a minor way serve as an inter-club and inter-association dissemination of information—

Q. Do most of the magazines also list directories of the various lodges and camps? A. Some do, some don't, it isn't a hard and fast rule, it is entirely up to the publisher and I would say that the majority of them do issue directories.

Q. What would your reaction t such magazines be if the pubic areas of the persons depicted were blocked out, the hair brushed out. A. Well, it would certainly be a very hypocritical approach to the philosophy we are trying to foster."

James Jackson Kilpatrick, Editor of the Richmond News Leader, one of Virginia's leading newspapers (T. 122), Vice-Chairman of the Virginia Commission on Constitutional

Government, draftsman of the present statute on obscenity (T. 127), authority on the subject of obscene materials, and writer of national distinction (T. 124), testified, after having examined the publications charged as being obscene (T. 129), that in his opinion the nudist publications were not obscene (T. 130).

This opinion came after Mr. Kilpatrick was asked a question which established the foundation for his expert opinion (T. 130). On the basis of this question, which included all the standards by which obscenity is to be judged, the publications were put to a most exacting test and passed without reservation or qualification.

On cross-examination, Mr. Kilpatrick established that he was not a nudist (T. 131); that it is distasteful to him (T. 138). He further stated that the Commonwealth "Exhibit No. 1," "Solis" magazine, and "Exhibit No. 2," the other nudist magazines that he examined, were not obscene (T. 132):

> "A. This Exhibit 1, may it please the Court, is a German magazine that's been out for a number of years. This is an old magazine, it comes out periodically and I remember taking some notes on it at the time that I was doing research on my book. It figured in an earlier case involving customs and the importation of it into this country, and was involved in one of the court cases holding that photographs that show the pubic hair could be imported; up to that time they had been excluded by customs as obscene and that ruling was reversed. And so this magazine figured at that time in it. I don't read German myself, at least not at all fluently

—the magazine appears to consist almost entirely of articles related to nudism. I can make that much out of it, together with these unretouched photographs, all of women except one, two, three, four, all but four. This other magazine appears at first glance to be entirely typical of these publications. While some of the photographs appear to have been posed for photographic purposes, that is professional photographic purposes, most of them appear to be in the field of snapshots, candid camera items. These two are unretouched and show the pubic hair, and they appear to be predominantly women, though in a few of the photographs children and men appear. It contains a directory of nudist camps as most of them seem to do, and I direct the Court's attention to this aspect of it, that none of these magazines contain the dirty little ads back in the back where you are supposed to send off your dollar to get the filthy pictures. You simply don't find those in these nudist magazines. I did—Mr. Horwitz was good enough to furnish me with this publication here, the Nudist Annual, I understand a duplicate copy of it was among those received, and I did go through this one and made some annotations on the major articles and, Your Honor, the articles are just as wholesome as they can be. The first article in this happens to deal with the hats that are worn at nudist camps. It's a light and a feature story, what we would carry on our women's page. The next one is an article entitled, 'The View From My Window,' and it deals with the family development of a nudist farm in Wisconsin and how they raised it up from scratch. Then comes a feature article called, 'How To Live On Love,'

which has a provocative title, but this is in a light vein concerned with the economics of nudism, that you don't have to buy so many clothes, so you save money. Another article deals with Woodland Acres, a nudist camp in northwest Illinois and again this is a how-we-built-it-up sort of thing, basic facts about nudism. The important thing about it is that there is not an erotic line in any of these things; there isn't a suggestive pose, there isn't a suggestive or salacious situation. When the couples are posed together, to the ordinary eye they appear to be husband and wife. There is simply nothing in this of a, in my opinion, a prurient, morbid, shameful, dirty, filthy nature. On the contrary, it's just sunshine and unclothed people, and it's a rather wholesome article, it's about what the organizations do. I have not gone through others, many of them still sealed up, but I have in the course of my work in this field gone through dozens of them, so I suppose—" (T. 132-134).

He testified, with respect to the redeeming social value, as follows (T. 138):

"What was said by the other witnesses merely to make the point that in my own view the law on it is clear and if there is any redeeming social value in an idea anywhere you have a right, however unpopular or distasteful as this nudism is distasteful to me. I wouldn't have any part of it, but it is an idea that is held by a good many thousands of people, and as I understand the nature of a free society, they have a right to advocate that idea, if it has any redeeming social importance, and I am willing to concede that social nudism

may have for some people some redeeming social importance. I believe they have an idea, they have a right to use these publications to advance their ideas, however much I may disagree with them."

Mr. Rosenbloom's testimony went to the point that he conducted his business properly and carries a wide variety of books (T. 53-54):

"Q. And you regard the book business as being an honorable profession? A. Yes, I certainly do.

Mr. Wilkinson: Judge, we will stipulate that the book business is an honorable business.

The Court: Well, I don't think—

Q. All right, now, will you tell the Court what kind of books you carry? A. Well, I believe that we have one of the most varied assortments anywhere in the area. We have textbooks, books preparation for civil service, government exams, we have some fiction, we have dictionaries, we have dictionaries and school books, in about seven different languages, for which we have regular calls, in Spanish, French, German, Italian, Russian and possibly one or two others."

There was no criticism of the manner in which Mr. Rosenbloom conducted his business. In fact, it was brought out that each of these publications was individually wrapped. There was no evidence of any promotional activity of these magazines.[5] Mr. Rosenbloom in fact testified

[5] Cf. *Ginzburg v. United States*, 383 U. S. 463 (1966).

that there was no greater demand for them than for any others that he has, and that they are "just another phase of business" (T. 66).

The importance of this case transcends the fate of a single bookseller who is called upon to pay a fine of $25.00 and denied the right (and, therefore, the profit resulting therefrom) to sell nudist publications. The greater import concerns the nudist movement and the rights of people all over the United States who are involved in it. The witness, Mr. Rogers, social worker and writer, and Mr. and Mrs. Young, owners of a nudist resort, gave dramatic evidence of the struggle which the movement has undergone and is still undergoing to achieve even a modicum of status. The need to clarify its purposes and to educate the general public of their way of life is basic to the movement. To deny the movement the right to satisfy this need through the sale and distribution of publications contradicts what this Court has said in *Roth* v. *United States, supra* at 484-485:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The Trial Court, which was not impressed with the argument that the nudist magazines are designed to foster the

emotional benefits to be obtained from nudism, characterized the argument as "so much manure and so little grass" —and held that the material is "utterly without redeeming social importance" (R. 38).

To allow this holding to stand—and with it the view of the Supreme Court of Appeals of Virginia that the holding was "plainly right" (R. 38; Appendix, *infra*, p. 21) —nullifies the authoritative evidence presented to the contrary.

3. The Virginia courts committed further error by misapplying the standards of the *Roth* case to support the finding that nudist publications are obscene. *Roth* was the very case this Court cited in the *per curiam* order in *Sunshine Book Co., supra,* that declared nudist publications not obscene and allowed them to be freely mailed. As has been shown, nudist publications do in fact have social importance and under *Roth* are not obscene.[6] See also *Parmelee* v. *United States, supra; Sunshine Book Co.* v. *Summerfield, supra; Mounce* v. *United States, supra; Manual Enterprises* v. *Day,* 370 U. S. 478 (1962); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966).

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[6] It is of interest that the Virginia statutes were based upon the American Law Institute Model Penal Code which was cited with approval by this Court in *Roth, supra* at 487, n. 20.

CONCLUSION

It is respectfully submitted that the conviction of the petitioner violates his constitutionally protected rights of freedom of speech and press, and that the State Court's judgment should be vacated. The denial of the petitioner's rights is tantamount to the denial of the same rights to others who have an interest in the unfettered distribution of their publications. For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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